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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re

ENRIQUE LOPEZ,

On Habeas Corpus.

F065791

(Stanislaus Super. Ct. No. 192419)

**OPINION**

**THE COURT\***

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus.

Tim Bazar, Public Defender, and Saul Garcia, Deputy Public Defender, for  
petitioner.

No appearance for Respondent.

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Petitioner seeks leave to file a belated notice of appeal.

On April 20, 2011, a jury found petitioner guilty of one count of first degree murder (Pen. Code, § 187, subd. (a)), a gun enhancement (Pen. Code, § 12022.53, subd. (d)), and one count of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)).

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\*Before Wiseman, Acting P.J., Levy, J., and Cornell, J.

On May 16, 2011, the court sentenced petitioner to state prison for a total term of 52 years to life. On that same date, petitioner instructed appointed counsel to file a notice of appeal on his behalf. Counsel agreed to do so and prepared the notice of appeal for his clerk to file forthwith. Trial counsel was unaware that the notice of appeal was either not filed by his office or lost by the superior court until late October 2011. Counsel's attempts to perfect an untimely appeal were unsuccessful and counsel filed a petition for writ of mandate in an attempt to perfect the appeal. This court issued an order granting the Attorney General leave to file an informal response to the petition for writ of mandate. The order provided: "The Attorney General is granted leave to file, within 20 days of this order, a response to the petition for writ of habeas corpus. The failure to respond will be construed as the Attorney General's agreement that appropriate relief may issue without further proceedings. (*People v. Romero* (1994) 8 Cal.4th 728.)" The Attorney General declined to file a response. This court deemed the "Petition for Writ of Mandate," filed on June 5, 2012, to be a "Petition for Writ of Habeas Corpus" and granted relief.

Thereafter, on September 28, 2012, counsel for petitioner filed a "PETITION FOR CONSTRUCTIVE FILING OF NOTICE OF APPEAL" stating that through no fault of petitioner, counsel failed to file a new notice of appeal by July 30, 2012. (The petition was filed as a petition for writ of habeas corpus.) The petition renewed the request for leave to file a belated notice of appeal. This court again issued an order granting the Attorney General leave to file an informal response to the petition. No response was filed.

A notice of appeal must be filed within 60 days of the date of the rendition of the judgment. (Pen. Code, § 1237.5; Cal. Rules of Court, rules 8.304, 8.308.) Although a criminal defendant has the burden of timely filing a notice of appeal, the burden may be delegated to trial counsel. (*In re Fountain* (1977) 74 Cal.App.3d 715, 719.) "A criminal

defendant seeking relief from his default in failing to file a timely notice of appeal is entitled to such relief, absent waiver or estoppel due to delay, if he made a timely request of his trial attorney to file a notice of appeal, thereby placing the attorney under a duty to file it, instruct the defendant how to file it, or secure other counsel for him [citation]; or if the attorney made a timely promise to file a notice of appeal, thereby invoking reasonable reliance on the part of the defendant [citation].” (*People v. Sanchez* (1969) 1 Cal.3d 496, 500.)

### **DISPOSITION**

Petitioner is entitled to relief. Petitioner is granted leave to file a notice of appeal on or before November 30, 2012, in Stanislaus County Superior Court case No. 192419.

Let a writ of habeas corpus issue directing the Clerk of the Stanislaus County Superior Court, if the Clerk receives the request and the notice of appeal on or before November 30, 2012, to file the notice of appeal, to treat the notice of appeal as being timely filed, and to process the notice of appeal in accordance with the applicable rules of the California Rules of Court.